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COMPETITION IN CONTRACTING ACT OF 1983

NOVEMBER 3 (legislative day, OCTOBER 31), 1983.—Ordered to be printed

Mr. COHEN, from the Committee on Armed Services, submitted the following

REPORT

[To accompany S. 338]

The Committee on Armed Services, to which was sequentially referred the bill (S. 338) to revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts, and for other purposes, having considered the same with respect to those portions of the bill which would amend Title 10 of the United States Code, reports favorably thereon with amendments and recommends that the bill as amended do pass.

I. INTRODUCTION

Greater reliance on competition in awarding Federal contracts has been recognized as a necessary goal for a number of years. The Competition in Contracting Act of 1983, S. 338, seeks to further the attainment of that goal by establishing a statutory preference for the use of competitive procedures in awarding Federal contracts for property or services, by imposing restrictions on the awarding of noncompetitive contracts, and by permitting Federal agencies to use the competitive method most conducive to the conditions of the contract.

S. 338 was introduced in the 98th Congress on February 1, 1983. The bill addresses the procurement procedures employed by all agencies of the Federal government. Accordingly, it proposes amendments to both statutes which provide the foundation for Fed-

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eral contracting: the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 2301 et seq., which governs the procurement practices of the civilian agencies, and the Armed Services Procurement Act of 1947 (ASPA), 10 U.S.C. § 2301 et seq., which applies to the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA) and the United States Coast Guard.

Upon introduction, S. 338 was referred to the Committee on Governmental Affairs. That Committee had conducted hearings on the subject of competition in contracting, and had previously recommended a similar legislative proposal in the 97th Congress. Therefore, the Committee on Governmental Affairs favorably reported S. 338 on March 23, 1983, and shortly thereafter filed a lengthy and detailed report on the issues surrounding competition in government contracting, along with a full analysis of the legislative provisions of the measure.

However, because S. 338 would amend the ASPA, a statute within the jurisdiction of the Committee on Armed Services, the bill was sequentially referred to this Committee for consideration of the proposed amendments to the ASPA. The Committee held hearings on June 7 and 9, 1983, taking testimony from the following individuals: Ms. Mary Ann Gilleece, Deputy Under Secretary of Defense (Acquisition Management); Mr. Harvey Gordon, Assistant Deputy Under Secretary of Defense (Acquisition); Mr. Dennis Trosch, Assistant General Counsel (Logistics), Department of Defense; Mr. Robert Gilroy, Senior Associate Director, National Security and International Affairs Division, General Accounting Office; Mr. Charles O. Starrett, Jr., Director, Defense Contract Audit Agency; Mr. Derek J. Vander Schaaf, Deputy Inspector General, Department of Defense; Professor John Cibinic, Jr., Government Contracts Program, National Law Center, The George Washington University; Mr. Robert M. Rosenzweig, President, Association of American Universities; and Mr. Bruce Hahn, National Tooling & Machining Association.

The Committee on Armed Services reported the bill favorably with amendments on June 27, 1983. This report will focus primarily on the amendments recommended by this Committee. For a more detailed background on the need for the bill in general and explanatory material on other portions of the bill, interested parties should consult the report filed on S. 338 by the Committee on Governmental Affairs. See S. Rep. No. 98-50, 98th Cong., 1st Sess. (1983).

II. Amendments of the Committee on Armed Services

The Committee on Armed Services proposes several amendments to the new ASPA provisions recommended by the Committee on Governmental Affairs. Some of these amendments are technical or editorial and are largely self-explanatory. Thus, the discussion which follows focuses on the amendments proposed by the Committee on Armed Services which make substantive modifications to the provisions of S. 338, as reported by the Committee on Governmental Affairs. Several other Committee concerns are also discussed.

A. DUAL-SOURCING AUTHORITY

The bill as reported by the Committee on Governmental Affairs would amend 10 U.S.C. § 2304(b) to clarify the right of an agency head to award a contract in order to establish or maintain an alternative source of supply if such award would (1) increase competition and likely result in reduced overall costs or (2) further industrial mobilization capabilities in a national emergency.

The Committee on Armed Services recommends several changes to this provision. The first would specifically permit the agency head to exclude a particular source (e.g. the contractor currently providing the goods or service) in exercising this dual-sourcing authority. This ability to exclude is essential to the concept of developing a second source of materials. The change would also make it clear that in establishing a second source the head of the agency must use competitive procedures.

Second, the Committee on Armed Services would make two adjustments to the grounds for the exercise of second-sourcing authority. Such authority could be exercised to maintain, as well as increase, competition which is likely to result in reduced overall procurement costs. The Committee also recommends recognizing the importance of essential research facilities to the strength of our industrial base. This research performed by educational and other nonprofit institutions, as well as federally-funded research centers, makes a critical contribution to our present and future defense capabilities. Unbridled competition for this type of work could jeopardize the continuance of facilities that are still vital centers of important research endeavors. Furthermore, there may be instances where additional capabilities in a given field need to be developed. Therefore, the Committee recommends a third ground for dual-sourcing—where it would be in the interest of national defense in establishing or maintaining an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States. The Committee feels strongly that the establishment and maintenance of such capabilities are necessary to retain the technological advantages that are critical to fielding a strong deterrent force.

B. GROUNDS FOR USE OF NONCOMPETITIVE PROCEDURES

S. 338 as reported by the Committee on Governmental Affairs divides procurement procedures into two categories: competitive (formal advertising and competitive negotiation) and non-competitive (sole source). In doing so, the bill eliminates the various grounds presently required to justify a departure from formal advertising (10 U.S.C. § 2304(a)). Instead, it substitutes a more limited series of grounds which would permit a departure from competitive procedures. The Committee on Armed Services recommends modifications to these grounds in several respects.

The first ground as proposed by the Committee on Governmental Affairs provides for the use of noncompetitive procedures when the property or services are available from only one source and no other type of property or services will satisfy the needs of the agency. The Committee on Armed Services would add a provision to clarify the concept of "availability." The proposed amendment

provides that property or services shall be considered to be available from a source if such source has the capability to produce the property or deliver the service in accordance with the Government's specifications and delivery schedule. This provision was added to make it clear that a potential supplier need not have an inventory of a particular item on hand immediately for the item to be considered to be available from such supplier, so long as the supplier can manufacture the item to specification in the time it is needed. This clarification is intended, in part, to prevent the Defense Department from disqualifying firms with a capability to manufacture aircraft spare parts from competing for such contracts, merely because such firms may not have an inventory of parts when a solicitation is issued.

The new subsection added by the Committee on Armed Services also incorporates the language of the present 10 U.S.C. § 2304(a)(14). This incorporation will make it clear that noncompetitive procedures are permitted for follow-on contracts involving technical or special property which have required a substantial initial investment or an extended period of preparation for manufacture, and where it is likely that production by a source other than the original source would result in additional cost to the Government or unduly delay the procurement of the property. The preservation of section 2304(a)(14) from present law is intended to clarify that in such circumstances competitive procurement is not required. There is a substantial body of law and administrative interpretations which has grown up around this language. The Committee does not intend that those precedents be discarded or deemed inapposite. For example, it has long been recognized that where one supplier has invested large amounts of money in establishing an assembly line for a complex weapon system, it may simply not be economical to tool a second line. Also, there may be a limited number of cases where necessary data, such as drawings or other specifications, needed for competition cannot reasonably be made available and there are no alternative ways of obtaining competition. The Committee emphasizes, however, that this provision is not intended to serve as a "carte blanche" justification for awarding all follow-on contracts noncompetitively.

S. 338 as reported by the Committee on Governmental Affairs also would permit use of noncompetitive procedures in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization. The Committee on Armed Services recommends that this ground be modified to recognize the need for establishing or maintaining essential research capabilities either through educational or nonprofit institutions or research and development centers funded by the United States. As the Committee noted above, these institutions make a vital, continuing contribution to our national defense. They cannot be totally exempt from the rigors of competition. They are not so today. Still the Committee feels that among the paramount concerns in awarding research contracts should be the qualifications, resources and expertise of the institution or organization. Therefore, the Committee felt it was imperative to provide agency heads with a degree of flexibility to establish or maintain an essential research

capability, without using competitive procedures, to be provided by specified types of institutions or organizations.

The Committee on Governmental Affairs also would permit the use of noncompetitive procedures when a statute provided that the procurement be made through another agency or a specified source. The Committee on Armed Services expanded this authority to apply to those cases in which the need is for a brand-name commercial item for authorized resale. This addition recognizes that in some situations, such as soft drink bottling, there may be only one source of supply. Current law permits resale situations as one exception from the preference for formal advertising. 10 U.S.C. § 2304(a)(8).

C. JUSTIFICATION FOR USE OF NONCOMPETITIVE PROCEDURES

S. 338 as reported by the Committee on Governmental Affairs did not require that the use of noncompetitive procedures be justified in writing. The Committee on Armed Services believes that such a requirement is necessary to permit effective oversight of the use of noncompetitive procedures. Therefore, a provision has been added requiring that use of noncompetitive procedures be justified in writing.

D. APPLICATION OF DAVIS-BACON AND WALSH-HEALY ACTS

The bill reported by the Committee on Governmental Affairs inadvertently deleted a provision of existing law which provides that purchases or contracts awarded using negotiated procedures shall be treated as if they were made with formal advertising for the purposes of applying the Davis-Bacon Act (40 U.S.C. 276a–276a–5) and the Walsh-Healy Act (41 U.S.C. 35–45). Contracts awarded under these statutes are subject to certain wage determinations made by the Secretary of Labor (Davis-Bacon) or other conditions (Walsh-Healy). The Committee on Armed Services has reinserted the provision deleted by the Committee on Governmental Affairs, modified slightly to accommodate the substantive changes made elsewhere in the bill.

E. AWARDS IN COMPETITIVE PROCUREMENT WITHOUT DISCUSSION

The bill reported by the Committee on Governmental Affairs would permit the head of an agency to evaluate competitive proposals and award a contract without discussions with offerors beyond discussions for the purpose of minor clarification. The Committee on Armed Services has provided that when the head of an agency wishes to make an award without discussion, it must be clearly demonstrated from the existence of effective competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussion would result in a fair and reasonable price. This provision was added to ensure that in making a contract award without any substantive discussions with the offerors, the Government has some basis for gauging or determining that the terms being offered would result in a fair and reasonable price.

F. EXCEPTIONS FROM ADVERTISING PROCUREMENTS

S. 338 as reported by the Committee on Governmental Affairs includes several provisions intended to ensure that solicitations are advertised so as to maximize the likelihood that there will be effective competition. In addition, that Committee's report indicated that some limited form of market search would be required even in the case of an unsolicited proposal "to determine whether the substance of the proposal is available without restriction from another source." S. Rep. No. 98–50, 98th Cong., 1st Sess. 23 (1983). Universities and research institutions expressed concern to the Committee on Armed Services that such advertising might compromise novel and innovative research concepts. Moreover, the possibility that ideas and theories offered on an unsolicited basis might be shopped around to others could chill the incentive to come forward with such novel thinking. The Committee on Armed Services believes that a statutory provision embodying such a potential disincentive could be counterproductive. Therefore, the Committee has recommended that the notice provisions of S. 338 not apply to those situations in which noncompetitive procurement will occur as a result of the acceptance of an unsolicited research proposal that demonstrates a unique or innovative research concept and where the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposed research or proprietary data associated with the proposal. The Committee strongly believes that this exemption strikes an appropriate balance between the need to promote competition and the value of stimulating innovative thinking.

S. 338 also exempts from the notice requirements situations where the notice would disclose the agency's needs and thereby compromise the national security. The Committee recognizes that there are programs which will justifiably fit this criteria. However, this exemption is not intended to encourage or sanction routine labelling of needs as nondisclosable so as to avoid potential competition.

G. EFFECTIVE DATE

The bill reported by the Committee on Governmental Affairs provided for an effective date 180 days after enactment. In testimony before the Committee on Armed Services, the Department of Defense requested an effective date one year after enactment. The Committee agreed upon an effective date 270 days after enactment.

H. OTHER AREAS OF COMMITTEE INTEREST

The bill reported by the Committee on Governmental Affairs addressed several other areas of interest to the Committee on Armed Services. While the Committee has not recommended any changes to the bill in these areas, the Committee believes it should make the observations and comments set out below.

1. Effective Competition

S. 338 as reported by the Committee on Governmental Affairs would delete the current statutory requirement that in certain ne-

gotiated procurements proposals must "be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured." 10 U.S.C. 2404(g). In its place, the Governmental Affairs bill substitutes a concept of "effective competition" and defines "competitive procedures" as those "under which the head of an agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the agency."

Some witnesses before the Committee on Armed Services urged that the existing requirement for soliciting the maximum number of qualified sources consistent with certain criteria be retained. Others agreed with the Committee on Governmental Affairs.

The Committee on Armed Services does not recommend a change in the bill language in this area. However, this does not mean that the Committee endorses, approves or recommends routine solicitation of only two sources—the minimum required for procedures to be competitive—in competitive procurements. Rather, the Committee expects that agency heads, and their responsible subordinates, will use their judgment to determine what number of sources it is practicable to solicit in light of the nature and requirements of the supplies or services to be procured. In this vein, the Committee notes that competition is only "effective" if "two or more contractors act independently to respond to a public need by offering property or services which meet that need." S. Rep. No. 98-50, 98th Cong., 1st Sess. 18 (1983).

2. Specifications—Minimum Needs

S. 338 as reported by the Committee on Governmental Affairs includes several provisions designed to make the Department of Defense define its needs (i.e. specifications) in order to maximize, rather than limit, competition. In this regard, the Committee on Governmental Affairs' report on S. 338 states, in several places, that specifications should be no more detailed or restrictive than is necessary to meet the Department's minimum needs. This standard has been articulated on a number of occasions by the Comptroller General. See e.g., *Constantine N. Polities & Co.,* B-189214, 78-2 CPD 437 (1978): *International Harvester Co.,* B-117773, 33 Comp. Gen. 567 (1954); *Wisher Power Sweeper Co.,* B-112329, 32 Comp. Gen. 384 (1953). The failure to specifically include that standard in S. 338 should not in any way be interpreted to modify or dilute this well-established principle.

3. Requirement that Head of Agency Consider Bids and Proposals

S. 338 as reported by the Governmental Affairs Committee requires that before the head of any agency may award a contract using noncompetitive procedures certain notice requirements must be met and the agency head must consider "all bids, proposals and quotations" received in response. The bill does not set forth what steps constitute "consideration" of a bid or proposal. The Committee intends that, at a minimum, the head of the agency must give each bid or proposal sufficient consideration so as to be able to make an informed judgment about the responsiveness of the bid and responsibility of the bidder.

III. Estimated Cost of Legislation

U.S. Congress,
Congressional Budget Office,
Washington, D.C., October 17, 1983.

Hon. John Tower,
Chairman, Committee on Armed Services, U.S. Senate, Russell, Senate Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 338, the Competition in Contracting Act of 1983, as ordered reported by the Senate Committee on Armed Services, June 27, 1983.

The bill revises procedures for awarding Federal contracts for property and services, with the intent of increasing competition in government procurement. The potential savings from effective implementation of this legislation are substantial, but cannot be estimated with precision. Of $123 billion in contracts over $10,000 awarded in fiscal year 1981, $67 billion (54 percent) were awarded noncompetitively, with over 80 percent of these noncompetitive awards made by the Department of Defense. About $46 billion of the $67 billion in noncompetitive contracts awarded in fiscal year 1981 were for actions under existing contracts, and approximately $6 billion of the remainder were for procurements under the "Buy Indian" program and for follow-on awards after competition—leaving about $15 billion in other new contract actions.

In 1982, the value of contracts over $10,000 increased by about 20 percent, to $147 billion. Those awarded noncompetitively increased by about 18 percent, from $67 billion in 1981 to $79 billion in 1982. If the distribution of these contracts between actions under existing contracts, new contract actions, "Buy Indian" and follow-on awards was approximately the same in fiscal year 1982 as it was in 1981, the new contract actions not subject to the constraints of follow-on awards or the "Buy Indian" program would be valued at about $18 billion in 1982, and would be expected to be even larger in fiscal year 1983 and future years.

Studies by the General Accounting Office and others have indicated that savings of 10 to 50 percent can sometimes be achieved through competitive contracting. While there is no reliable methodology available to estimate total savings from the bill, such savings could be significant, because each 1 percent saved on new contract actions would save close to $200 million per year. Also, in the long term, the costs of modifications to existing contracts may be reduced by the prospects of future competition.

Additional savings may be achieved by reducing, from $500,000 to $100,000, the threshold value of negotiated defense contracts above which cost and pricing data must be certified by the contractor. This will make the defense threshold consistent with the threshold for civilian contracts included in the Federal Procurement Regulations. The savings could result from additional assessments for contract violations, though additional audits would be required to identify such violations. The magnitude of receipts cannot be estimated and would depend on both the discovery of additional

violations and the extent to which the Department of Defense increased its auditing effort.

The bill also requires the head of each executive agency to submit annual reports to the Congress in each fiscal year from 1983 through 1986. These reports will summarize actions taken to increase competition during the previous year and will outline plans for the future. The costs of producing these reports are not expected to be significant.

Enactment of this bill would not affect the budgets of State and local governments.

On March 23, 1983, the Congressional Budget Office prepared a cost estimate for the version of S. 338 reported by the Senate Committee on Governmental Affairs. The Armed Services Committees' amendments would broaden the category of contracts that could be awarded under noncompetitive procedures, and would probably result in less competitive contracting than the Governmental Affairs Committee's version. There is no basis for estimating the difference in savings between two versions.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

RUDOLPH G. PENNER, *Director.*

IV. EVALUATION OF REGULATORY IMPACT

The Committee on Governmental Affairs set forth in its report on S. 338 a brief statement with respect to the regulatory impact of the legislation, as required by paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate. The Armed Services Committee concurs in that statement. The Committee does not believe that the amendments adopted during its consideration of S. 338 will modify the regulatory impact from that associated with the bill as reported by the Committee on Governmental Affairs.

V. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which change is proposed is shown in roman). Since the Committee on Armed Services had no jurisdiction over provisions of S. 338 related to Title 41 of the United States Code, those provisions of the bill are not reported here. Such provisions are shown in Senate Report 98-50.

TITLE 10—ARMED FORCES

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CHAPTER 137—PROCUREMENT GENERALLY

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§ 2301. Declaration of policy

(a)(1) The Congress finds that in order to ensure national defense preparedness, to conserve fiscal resources, and to enhance defense production capability, it is in the interest of the United States to acquire property and services for the Department of Defense in the most timely, economic, and efficient manner. It is therefore the policy of the Congress that services and property (including weapon systems and associated items) for the Department of Defense be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multiyear contracts, that will promote the interest of the United States. Further, it is the policy of the Congress that such contracts, when practicable, provide for the purchase of property at times and in quantities that will result in reduced costs to the Government and provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology.

(2) It is also the policy of the Congress that contracts for advanced procurement of components, parts, and materials necessary for manufacture or for logistics support of a weapon system should, if feasible and practicable, be entered into in a manner to achieve economic-lot purchases and more efficient production rates.

(b) It is also the policy of Congress that a fair proportion of the purchases and contracts made under this chapter be placed with small business concerns.

§ 2302. Definitions

In this chapter—

(1) "Head of an agency" means *The Secretary, any Deputy Secretary, any Under Secretary, or any Assistant Secretary of Defense;* the Secretary, the Under Secretary, or any Assistant Secretary, of the Army, Navy, or Air Force; the Secretary of Transportation; or the Administrator of the National Aeronautics and Space Administration.

[(2) "Negotiate" means make without formal advertising.

[(3) "Formal advertising" means advertising as prescribed by section 2305 of this title.]

(2) "Agency" means any department or establishment specified in section 2303 (a) of this title.

(3) "Competitive procedures" means procedures under which the head of an agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the agency.

(4) "Noncompetitive procedures" means procedures other than competitive procedures.

(5) "Small purchase" means any purchase or contract which does not exceed $25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using small purchase procedures.

§ 2303. Applicability of chapter

(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in subsection (b), and all services, for which payment is to be made from appropriated funds:

(1) The Department of Defense.

[1]*(2)* The Department of the Army.

[2]*(3)* The Department of the Navy.

[3]*(4)* The Department of the Air Force.

[4]*(5)* The Coast Guard.

[5]*(6)* The National Aeronautics and Space Administration.

(b) This chapter does not cover land. It covers all other property including—

(1) public works;
(2) buildings;
(3) facilities;
(4) vessels;
(5) floating equipment;
(6) aircraft;
(7) parts;
(8) accessories;
(9) equipment; and
(10) machine tools.

(c) The provisions of this chapter that apply to the procurement of property apply also to contracts for its installation or alteration.

[§ 2304. Purchases and contracts; formal advertising; exceptions

[(a) Purchase of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if—

[(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

[(2) the public exigency will not permit the delay incident to advertising;

[(3) the aggregate amount involved is not more than $25,000;

[(4) the purchase or contract is for personal or professional services;

[(5) the purchase or contract is for any service by a university, college, or other educational institution;

[(6) the purchase or contract is for property or services to be procured and used outside the United States and the Territories, Commonwealths, and possessions;

[(7) the purchase or contract is for medicine or medical supplies;

[(8) the purchase or contract is for property for authorized resale;

[(9) the purchase or contract is for perishable or nonperishable subsistence supplies;

[(10) the purchase or contract is for property or services for which it is impracticable to obtain competition.

[(11) the purchase or contract is for property or services that he determines to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research;

[(12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components;

[(13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;

[(14) The purchase or contract is for technical or special property that he determines to require a substantial initial investment of an extended period of preparation for manufacture, and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property;

[(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and give him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lower negotiated price offered by any responsible supplier;

[(16) he determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or

[(17) negotiation of the purchase or contract is otherwise authorized by law.

[(b) The data respecting the negotiation of each purchase or contract under clauses (1) and (7)–(17) of subsection (a) shall be kept by the contracting agency for six years after the date of final payment on the contract.

[(c) This section does not authorize—

[(1) the negotiation of a contract to construct or repair any building, road, sidewalk, sewer main, or similar item, unless—

[(A) It is made under clauses (1)–(3), (10)–(12), or (15) of subsection (a); or

[(B) it is to be performed outside the United States; or

[(2) the erection, repair, or furnishing of any public building or public improvement.

[(d) Whenever the head of the agency determines it to be practicable, such advance publicity as he considers suitable with regard to the property involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for property, or a service, under clause (7) or (8) of subsection (a) involving more than $10,000.

[(e) A report shall be made to Congress, on May 19, and November 19 of each year, of the purchases and contracts made under clauses (1) and (16) of subsection (a) during the period since the date of the last report. The report shall—

[(1) name each contractor;

[(2) state the amount of each contract; and

[(3) describe, with consideration of the national security, the property and services covered by each contract.

[(f) For the purposes of the following laws, purchases or contracts negotiated under this section shall be treated as if they were made with formal advertising:

[(1) The Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (commonly referred to as the "Walsh-Healy Act") (41 U.S.C. 35–45).

[(2) The Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1981 (commonly referred to as the "Davis-Bacon Act") (40 U.S.C. 276a–276a–5)

[(g) In all negotiated procurements in excess of $25,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however,* That the requirements of the subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and rea-

sonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion.

[(h) Except in a case where the Secretary of Defense determines that military requirements necessitate specification of container sizes, no contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.]

§ 2304. Competition requirements

(a) Except as provided in subsection (e) of this section or otherwise provided by law, the head of an agency shall use competitive procedures in making contracts for property or services. The head of an agency shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. The head of an agency shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify the needs of the agency and solicit bids or proposals in a manner designed to achieve effective competition for the contract.

(b) The head of an agency may provide for the procurement of property or services in order to establish or maintain any alternative source or sources of supply under this title using competitive procedures but excluding a particular source for that property or services if such head of an agency determines that to do so would (1) increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services, (2) be in the interest of industrial mobilization in the case of a national emergency or (3) be in the interest of national defense in establishing or maintaining an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States.

(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

(d) For other than small purchases, the head of an agency, when using competitive procedures—

(1) shall solicit sealed bids when—

(A) time permits the solicitation, submission, and evaluation of sealed bids;

(B) the award will be made on the basis of price and other price-related factors;

(C) it is not necessary to conduct discussions with the responding sources about their bids; and

(D) there is reasonable expectation of receiving more than one sealed bid;

(2) shall request competitive proposals from responding sources when sealed bids are not required under clause (1) of this subsection.

(e) The head of an agency may use noncompetitive procedures only when—

(1) the property or services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the agency;

(2) the agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured by the delay associated with using competitive procedures;

(3) it is necessary to award the contract to a particular source or sources in order to (A) maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency, (B) achieve industrial mobilization in case of such emergency, or (C) establish or maintain an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States;

(4) the terms of any international agreement or treaty between the United States Government and a foreign government or international organization, or the directions of any foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

(5) a statute authorizes or requires that the procurement be made through another agency or from a specified source; or the agency's need is for a brand-name commercial item for authorized resale; or

(6) the disclosure of the agency's needs to more than one source would compromise the national security.

(f) For the purposes of applying section 2304(e)(1) hereof: (A) property or services shall be considered to be available from a source if such source has the capability to produce the property or deliver the service in accordance with the Government's specifications and delivery schedule, and (B) in the case of the procurement of technical or special property which has required a substantial initial investment or an extended period of preparation for manufacture, and where it is likely that production by a source other than the original source would result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property, the property may be deemed to be available only from the initial source and may be procured through noncompetitive procedures.

(g) The head of an agency may not award a contract using noncompetitive procedures unless—

(1) the use of such procedures has been justified in writing;

(2) a notice has been published with respect to such contract pursuant to section 2305(c) of this title and all bids or proposals received in response to such notice have been considered by such head of an agency, and

(3) in the case of any contract exceeding $100,000, the use of such procedures is approved by the head of the organizational element of such agency which has the responsibility to enter into such contract or by a designee of the head of such organi-

zational element who is higher in such organizational element than the contracting officer issuing the solicitation with respect to such contract.

(h) For the purposes of the following laws, purchases or contracts made under this chapter using other than sealed bid procedures shall be treated as if they were made with sealed bid procedures:

(1) Sections 35–45 of title 41.

(2) Sections 276a–276a–5 of title 40.

[§ 2305. Formal advertisements for bids; time; opening; award; rejection

[(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned. Except in a case where the Secretary of Defense determines that military requirements necessitate specification of container sizes, no advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

[(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

[(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

[(d) If the head of the agency considers that any bid received after formal advertising evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.]

§ 2305. Solicitation, evaluation, and award procedures; notice requirements

(a)(1)(A) Each solicitation under this title shall include specifications which—

(i) consistent with the needs of the agency, permit effective competition; and

(ii) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

(B) For the purposes of subparagraph (A) of this paragraph, the type of specification included in any solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(i) function so that a variety of products or services may qualify;

(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(iii) design requirements.

(2) Each solicitation for sealed bids or competitive proposals other than for small purchases shall at a minimum include, in addition to the specifications described in paragraph (1) of this subsection—

(A) a statement of—

(i) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

(ii) the relative importance assigned to each of those factors;

(B) in the case of sealed bids—

(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

(ii) the time and place for the opening of the sealed bids; and

(C) in the case of competitive proposals—

(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

(ii) the time and place for submission of proposals.

(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of an agency determines that such action is in the public interest.

(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of an agency shall evaluate the bids without discussions with the bidders and shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, solely considering the price and the other factors included in the solicitation under subsection (a)(2)(A) of this section. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

(4)(A) The head of an agency shall evaluate competitive proposals and may award a contract—

(i) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

(ii) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification where it can be clearly demonstrated from the existence of effective competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in fair and reasonable prices.

(B) In the case of award of a contract under subparagraph (A)(i) of this paragraph, the head of an agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

(C) In the case of award of a contract under subparagraph (A)(ii) of this paragraph, the head of an agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

(D) The head of an agency shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, solely considering price and other factors included in the solicitation under subsection (a)(2)(A) of this section. The head of the agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

(5) If the head of an agency considers that any bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General for appropriate action.

(c)(1)(A) Except as provided in paragraph (3) of this subsection—

(i) the head of an agency intending to solicit bids or proposals for a contract for property or services at a price expected to exceed $10,000 shall furnish for publication by the Secretary of Commerce a notice described in paragraph (2) of this subsection;

(ii) the head of an agency awarding a contract for property or services at a price exceeding $10,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

(B) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by subparagraph (A) of this paragraph.

(C) Whenever a head of an agency is required by subparagraph (A)(i) of this paragraph to furnish a notice of a solicitation to the Secretary of Commerce, such head of an agency may not—

(i) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

(ii) establish a deadline for the submission of all bids or proposals in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

(2) Each notice required by subsection (1)(A)(i) of this subsection shall include—

(A) an accurate description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

(B) the name and address of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation;

(C) a statement that any person may submit a bid or proposal which shall be considered by the agency; and

(D) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of

noncompetitive procedures and the identity of the intended source.

(3)(A) A notice is not required under subsection (1)(A) of this subsection if—

(i) the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security; or

(ii) the proposed noncompetitive procurement would result from acceptance of an unsolicited research proposal that demonstrates a unique or innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposed research or proprietary data associated with the proposal.

(B) The requirements of subsection (1)(A)(i) of this subsection do not apply—

(i) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(e) of this title; and

(ii) in the case of any procurement for which the head of the agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

§ 2306. Kinds of contracts

(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and subject to subsections (b)–(f), the head of an agency [may, in negotiating contracts under section 2304] *may in awarding contracts after using other than sealed bid procedures* of this title, make any kind of contract that he considers will promote the best interests of the United States.

(b) Each contract [negotiated under section 2304] *awarded after using other than sealed bid procedures* of this title shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration.

(c) No cost contract, cost-plus-a-fixed-fee contract, or incentive contract may be made under [section 2304 of this title] *this chapter* unless the head of the agency determines that such a contract is likely to be less costly to the United States than any other kind of contract or that it is impracticable to obtain property or services of the kind or quality required under such a contract.

(d) The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-

fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

(e) Each cost contract and each cost-plus-a-fixed-fee contract shall provide for notice to the agency by the contractor before the making, under the prime contract, of—

(1) a cost-plus-a-fixed-fee subcontract; or

(2) a fixed-price subcontract or purchase order involving more than $25,000 or 5 percent of the estimated cost of the prime contract.

(f)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost of pricing data he submitted was accurate, complete and current—

(A) [prior to the award of any negotiated prime contract under this title where the price is expected to exceed $500,000;] *prior to the award of any prime contract under this title after using other than sealed bid procedures where the contract price is expected to exceed $100,000;*

(B) prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency;

(C) prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000; or

(D) prior to the pricing of any contract change or modification to a subcontract covered by clause (C), for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency.

(2) Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the [negotiated] price as is practicable), was inaccurate, incomplete, or noncurrent: *Provided,* That the requirements of this subsection need not be applied to contracts of subcontracts where the price [negotiated] is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have

the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the [negotiation,] *proposal for the contract, the discussions conducted on the proposal under this title,* pricing, or performance of the contract or subcontract.

(g)(1) The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) for which funds would otherwise be available for obligation only within the fiscal year for which appropriated—

(A) operation, maintenance, and support of facilities and installations;

(B) maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

(C) specialized training necessitating high quality instructor skills (for example, pilot and aircrew members; foreign language training); and

(D) base services (for example, ground maintenance; in-plane refueling; bus transportation; refuse collection and disposal);

whenever he finds that:

(i) there will be continuing requirement for the services consonant with current plans for the proposed contract period;

(ii) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

(iii) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation.

(2) In entering into such contracts, the head of the agency shall be guided by the following principles:

(A) The portion of the cost of any plant or equipment amortized as a cost of contract performance should not exceed the ratio between the period of contract performance and the anticipated useful commercial life of such plant or equipment. Useful commercial life, for this purpose, means the commercial utility of the facilities rather than the physical life thereof, with due consideration given to such factors as location of facilities, specialized nature thereof, and obsolescence.

(B) Consideration shall be given to the desirability of obtaining an option to renew the contract for a reasonable period not to exceed three years, at prices not to include charges for plant, equipment and other nonrecurring costs, already amortized.

(C) Consideration shall be given to the desirability of reserving in the agency the right, upon payment of the unamortized portion of the cost of the plant or equipment, to take title thereto under appropriate circumstances.

(3) In the event funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from—

(A) appropriations originally available for the performance of the contract concerned;

(B) appropriations currently available for procurement of the type of services concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(h)(1) To the extent that funds are otherwise available for obligation, the head of an agency may make multiyear contracts (other than contracts described in paragraph (6)) for the purchase of property, including weapon systems and items and services associated with weapon systems (or the logistics support thereof), whenever he finds—

(A) that the use of such a contract will promote the national security of the United States and will result in reduced total costs under the contract;

(B) that the minimum need for the property to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities;

(C) that there is a reasonable expectation that throughout the contemplated contract period the Department of Defense will bequest funding for the contract at the level required to avoid contract cancellation;

(D) that there is a stable design for the property to be acquired and that the technical risks associated with such property are not excessive; and

(E) that the estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

(2)(A) The Secretary of Defense shall prescribe defense acquisition regulations to promote the use of multiyear contracting as authorized by paragraph (1) in a manner that will allow the most efficient use of multiyear contracting.

(B) Such regulations may provide for cancellation provisions in such multiyear contracts to the extent that such provisions are necessary and in the best interests of the United States. Such cancellation provisions may include consideration of both recurring and nonrecurring costs of the contractor associated with the production of the items to be delivered under the contract.

(C) In order to broaden the defense industrial base, such regulations shall provide that, to the extent practicable—

(i) multiyear contracting under paragraph (1) shall be used in such a manner as to seek, retain, and promote the use under such contracts of companies that are subcontractors, vendors, or suppliers; and

(ii) upon accrual of any payment or other benefit under such a multiyear contract to any subcontractor, vendor, or supplier company participating in such contract, such payment or benefit shall be delivered to such company in the most expeditious manner practicable.

(D) Such regulations shall also provide that, to the extent practicable, the administration of this subsection, and of the regulations prescribed under this subsection, shall not be carried out in a manner to preclude or curtail the existing ability of agencies in the Department of Defense to—

(i) provide for competition in the production of items to be delivered under such a contract; or

(ii) provide for termination of a prime contract the performance of which is deficient with respect to cost, quality, or schedule.

(3) Before any contract described in paragraph (1) that contains a clause setting forth a cancellation ceiling in excess of $100,000,000 may be awarded, the head of the agency concerned shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

(4) Contracts made under this subsection may be used for the advance procurement of components, parts, and materials necessary to the manufacture of a weapon system, and contracts may be made under this subsection for such advance procurement, if feasible and practical, in order to achieve economic-lot purchases and more efficient production rates.

(5) In the event funds are not made available for the continuation of a contract made under this subsection into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from—

(A) appropriations originally available for the performance of the contract concerned;

(B) appropriations currently available for procurement of the type of property concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(6) This subsection does not apply to contracts for the construction, alteration, or major repair of improvements to real property or contracts for the purchase of property to which section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) applies.

(7) This subsection does not apply to the Coast Guard or the National Aeronautics and Space Administration.

(8) For the purposes of this subsection, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contigent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

(i) Except in a case in which the Secretary of Defense determines that military requirements necessitate the specification of container sizes, no contract for the carriage of Government property in other than Government-owned containers shall require carriage of such property in cargo containers of any stated length, height, or width.

§ 2307. Advance payments

(a) The head of any agency may—

(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Payments made under subsection (a) may not exceed the unpaid contract price.

(c) Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens.

(d) Payments under subsection (a) in the case of any contract, other than partial, progress, or other payments specifically provided for in such contract at the time such contract was initially entered into, may not exceed $25,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed payments and 60 days of continuous session of Congress have expired following the date of which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such payments. For purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period.

§ 2308. Assignment and delegation of procurement functions and responsibilities

Subject to section 2311 of this title, to facilitate the procurement of property and services covered by this chapter by each agency named in section 2303 of this title for any other agency, and to facilitate joint procurement by those agencies—

(1) the head of an agency may, within his agency, delegate functions and assign responsibilities relating to procurement;

(2) the heads of two or more agencies may by agreement delegate procurement functions and assign procurement responsibilities from one agency to another of those agencies or to an officer or civilian employee of another of those agencies; and

(3) the heads of two or more agencies may create joint or combined offices to exercise procurement functions and responsibilities.

§ 2309. Allocation of appropriations

(a) Appropriations available for procurement by an agency named in section 2303 of this title may, through administrative allotment, be made available for obligation for procurement by any other agency in amounts authorized by the head of the allotting agency and without transfer of funds on the books of the Department of the Treasury.

(b) A disbursing officer of the allotting agency may make any disbursement chargeable to an allotment under subsection (a) upon a

voucher certified by an officer or civilian employee of the procuring agency.

§ 2310. Determinations and decisions

(a) Determinations and decisions required to be made under this chapter by the head of an agency may be made for an individual purchase or contract or for a class of purchases or contracts. Such a determination or decision is final.

[(b) Each determination or decision under clauses (11)–(16) of section 2304(a), section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title and a decision to negotiate contracts under clauses (2), (7), (8), (10), (12), or for property or supplies under clause (11) of section 2304(a), shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) are clearly illustrative of the conditions described in clauses (11)–(16) of section 2304(a), (2) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (3) support of the findings required by section 2306(g)(1), (4) clearly indicates why advance payments under section 2307(c) would be in the public interest, (5) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest, or (6) clearly and convincingly establish with respect to the use of clauses (2), (7), (8), (10), (12), and for property or supplies under clause (11) of section 2304(a), that formal advertising would not have been feasible and practicable. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.]

(b) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (2) support the findings required by section 2306(g)(1), (3), clearly indicate why advance payments under section 2307(c) would be in the public interest, or (4) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.

§ 2311. Delegation

[The head of an agency may delegate, subject to his direction, to any other officer, or official of that agency, any power under this chapter except the power to make determinations and decisions

under clauses (11)–(16) of section 2304(a) of this title. However, the power to make a determination or decision under section 2304(a)(11) of this title may be delegated to any other officer or official of that agency who is responsible for procurement, and only for contracts requiring the expenditure of not more than $5,000,000.]

The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter.

§ 2312. Remission of liquidated damages.

Upon the recommendation of the head of an agency, the Comptroller General may remit all or part, as he considers just and equitable, of any liquidated damages assessed for delay in performing a contract, made by that agency, that provides for such damages.

§ 2313. Examination of books and records of contractor

(a) An agency named in section 2303 of this title is entitled, through an authorized representative, to inspect the plant and audit the books and records of—

(1) a contractor performing a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter; and

(2) a subcontractor performing any subcontract under a cost-plus-a-fixed-fee contract made by that agency under this chapter.

(b) Except as provided in subsection (c), each contract [negotiated] *awarded after using other than sealed bid procedures* under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

(c) Subsection (b) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the need of the agency determines, with the concurrence of the Comptroller General or his designee, that the application of that subsection to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required—

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the head of the agency determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by not applying subsection (b).

If subsection (b) is not applied to a contract or subcontract based on a determination and under clause (2), a written report shall be furnished to the Congress.

§ 2314. Laws inapplicable to agencies named in section 2303 of this title

Sections 5, 6, 6a, and 13 of title 41 do not apply to the procurement of property or services by the agencies named in section 2303 of this title.

§ 2315. Laws inapplicable to the procurement of automatic data processing equipment and services for certain defense purposes

(a) Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 795) is not applicable to the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of the equipment or services—

(1) involves intelligence activities;

(2) involves cryptologic activities related to national security;

(3) involves the command and control of military forces;

(4) involves equipment that is an integral part of a weapon or weapons system; or

(5) subject to subsection (b), is critical to the direct fulfillment of military or intelligence missions.

(b) Subsection (a)(5) does not include procurement of automatic data processing equipment or services to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications).

§ 2316. Record requirements

(a) Each head of an agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

(1) noncompetitive procedures were used; and

(2) only one bid or proposal was received after competitive procedures were used.

(b) The record established under subsection (a) of this section shall include, with respect to each procurement—

(1) information identifying the source from whom the purchase was made or to whom the contract was awarded;

(2) the property or services obtained by the Government under the procurement;

(3) the total cost of the procurement;

(4) the reason under section 2304(e) of this title for the use of noncompetitive procedures; and

(5) the position of the officers or employees of the agency who required and approved the use of noncompetitive procedures in such procurement.

(C) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5)).

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